

## Government Liability in Tort

C. Z.

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

C. Z., *Government Liability in Tort*, 9 Marq. L. Rev. 300 (1925).

Available at: <http://scholarship.law.marquette.edu/mulr/vol9/iss4/19>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

factors naïvely adds, "It is, however, sometimes impossible to ascertain when conduct ceases to be influenced by an internal factor and becomes influenced by an external factor, or vice versa."

In several places we are told that confusion arises from not having definition, yet the definitions here attempted make "confusion worse confounded."

Section 19 gives us the headline in bold-faced type THE STATE and then at once "In this discussion the word 'state' will be discarded," yet the next three lines of the paragraph contain the word twice and in paragraph 69 the author found it necessary to insert the word (state) to explain his use of the word government.

What can anyone make of his "Definition of Rules of Conduct" pp. 24 and 25? But perhaps the author did not mean to make himself clear, for we are told in §28 "The word 'law' has been used in several senses." Then in §29 "There can be no dogmatic assumption that any particular definition of the word 'law' is correct. All that can be asked is that an author shall rigorously define the meaning throughout the discussion, and as a practical aid to the clarity of exposition, avoid the word 'law' whenever possible." Yet most of the subsequent pages of the book employ the word law and that without any rigorous definition, although in justice to the writer it must be said that §85 does select the "narrowest sense" of "law" while treating of jurisprudence but does not "stick" to that meaning. Similar treatment is accorded other terms. Under the heading "Rights," §41, we learn "The word 'right' is used in so many different senses that it has lost all possibility of accurate significance. It is obvious, therefore, that the word is useless for the purpose of expressing accurate thought and will therefore be discarded," yet the word is used nine times in the two pages following, besides being inserted in brackets to explain the words "Natural Powers." Since "right" suffers thus we must expect "duty" to be treated likewise, and we are not disappointed. "The notion of duty (44) bulks large in legal philosophy," but—"why, therefore, invent the idea of duty?" "It is totally unnecessary in any investigation of political power or public opinion."

It might furnish amusement to take up the author's treatment of "Liberty," especially "Civil Liberty," "Legal Persons," "The Government and Law," "Judges do not Make Law," and other topics, but *cui bono*? However, we cannot fail to object to the statement under the heading "Justice," "There is no standard of justice and the justice which, in fact, exists is of varying content."

Even a long, "plain statement" of this type could not give us the "Essential nature of law."

H. B. M.

**Government Liability in Tort.** By EDWIN M. BORCHARD. Yale Law Journal. 1925. 92 Pages.

The purpose of the author is to re-examine the whole subject indicated by the title from the point of view of theory and history in order to bring the law into harmony with the practical exigencies of modern life. He points out that the doctrine that a government is not responsible for the torts committed by its officers rests on the medieval English theory that the king can do no wrong which somehow was not discarded in America when the thirteen colonies broke away from the motherland, and has survived merely by reason of its antiquity. He emphasizes the fact that the most monarchical countries of Europe, though their

officers are usually a trained body of men, have thrown overboard this theory and that a movement is on in England to do away with it. He pleads for a breaking of the fetters of this medieval misconception on the ground that it never had much justification though it has assumed in the eyes of many the institutional impregnability of an article of faith. He passes in review the history of this part of the law, its anomalies and paradoxes, the lack of theoretical justification, the theories on which the government has been held liable for such tort, and the state of the law in continental Europe. The text is supported by a prodigious wealth of footnotes which enhance the value of the booklet to all concerned whether they are teachers of law, government officials or practicing attorneys.

The pamphlet should be a welcome addition to the library of any attorney who handles personal injury business. It is a veritable arsenal of weapons with which to attack the existing rules of law on the subject and its use will, it is hoped, in many cases result not only in doing justice to an injured individual but in an improvement of our law. Of course much of this improvement will have to be sought from the legislature, but even in arguing before a legislative committee, or the legislature itself, competent knowledge of the subject under discussion is no mean advantage.

C. Z.

